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Supreme Court of the United States

October Term, 1959

No. 660

THOMAS MICHAELS

Petitioner

v.

CLEVELAND TANKERS INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Cases Cited

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No. _____

THOMAS MICHALIC,

Petitioner,

against

CLEVELAND TANKERS INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled matter on October 29, 1959.

Opinions of the Courts Below

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, Honorable James C. Connell, in favor of respondent is unreported and is set out in the appendix to this petition at pages 11a to 18a.

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported to date, and is set out in the appendix to this petition at pages 1a to 10a.

Jurisdiction

This action, predicated upon the Jones Act, 46 U. S. C. § 688, and the doctrine of seaworthiness under the general maritime law, was brought in the United States District Court for the Northern District of Ohio, Eastern Division.

The order and judgment of dismissal was appealed from by petitioner.

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the lower Court, was filed on October 29, 1959.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Question Presented

Whether the Court below usurped the jury function in failing to review the evidence on a dismissal motion in a light most favorable to the plaintiff-petitioner by the simple expedient of emasculating the meaning of the clear, descriptive testimony given by the petitioner and witnesses.

Statute Involved

Jones Act, 46 U. S. C. § 688:

> "§ 688. Recovery for Injury to or Death of Seaman
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such

seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Statement of Facts

Thomas Michalic, the petitioner, 44 years old, had sailed on the Great Lakes for about four years (pp. 2, 3).[1] He joined the S.S. Orox as a fireman at Erie, Pennsylvania, in October, 1955 (3), had previously worked for the defendant for about three years (3), and was in good health and able to work (28, 193).

Michalic worked in the firehold, his duty was to keep the steam pressure up and to watch the water in the boilers (4).

In December, 1955, the vessel was in Cleveland for lay-up after the sailing season (5). At 8:00 o'clock A. M. while in the firehold (5), petitioner was ordered by the first assistant engineer (5, 206, 210), his superior officer (4), to assist Hansen, the pumpman, in the pumproom (5, 39). As a fireman, Michalic had never been in the pumproom (38) and knew nothing about the work (39).

In the pumproom, Hansen told Michalic to work on the starboard pump, to knock the nuts off the casing (cover) (212), and that he would work on the other one (6, 34). For the purpose, he gave petitioner "a big wrench, old beat-up wrench" (7) and "an old lead mallet" (8). The wrench was about a foot long "open end" and "all chewed up on the end" (8). Hansen then left Michalic to do other work (8, 213).

[1] Pages of the trial minutes.

Michalic had to leave the catwalk, which ran athwartship (7, 8), crawl forward between four beams holding the pump to keep it from vibrating (11) and work underneath the catwalk (8, 199, 212, Def. Exh. A, B, C,[2] estimated by the plaintiff and witnesses to be from six to sixteen inches above the pump (11, 183).

Loosening the nuts by placing the wrench around each one in turn and striking it with the mallet (8), Michalic had difficulty in doing the job (36) since the wrench constantly slipped (45, 46).

When the pumpman returned, petitioner told him "the tool is not very good, kind of beat up. * * * This wrench keeps slipping off", to which Hansen told him, "Never mind about that, do the job as best you can." (10, 36, 39), and again left (10).

Michalic continued removing the nuts. There were about three or four left when, in loosening one, he struck the wrench with the mallet, as usual, and the wrench slipped off the nut, fell and struck him on the big toe of the left foot (10, 45). He had used the same wrench and mallet during the entire period (36) and was not aware of any others in the pumproom tool box (40).

Hansen returned two hours later (11). By that time Michalic had finished the job, laid all the nuts on the catwalk, crawled out from underneath and was waiting for him (12). He couldn't leave the job (11). His feet were cold and frozen since he had been standing in water (11).

Michalic did not think the injury serious at that time (11, 41) and worked for the rest of the day, then soaked his foot in epsom salts (41). His left big toe hurt terribly, but he continued to work laying up the ship (12).

The toe nail became infected about one week after the accident but petitioner, thinking it would clear up (41), continued on duty into January, 1956 (13).

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[2] Appendix of Record 106a, 108a 110a.

After finishing work on the ORION, Michalic returned to Erie, Pennsylvania, and continually soaked the foot in hot water and epsom salts (13).

Two witnesses, fellow seamen, testified that they saw Michalic working in the pumproom (122, 125). Both saw him limping after that time aboard the ship and bathing his foot (122, 127).

Michalic was seen limping by his landlady's daughter in January, 1956 when he returned to Erie, and with a more pronounced limp in April, which necessitated the use of a cane (152, 153). She saw him soak the foot between January and March, and again after his return in April (153). He did not limp before boarding the vessel in the fall of 1955 (152).

Petitioner rejoined the vessel as a fireman in Cleveland on March 15, 1956, upon receiving instructions from the Union Hall in Detroit, and was still bathing his toe at that time (13, 14). His leg was very bad, very painful (14). In Toledo, on April 1st, the pain became unbearable and Michalic told the engineer that he wanted a hospital ticket to leave the ship for treatment (14). He informed the vessel's captain of the December accident (15), and had previously told an oiler, a fireman and a couple of forward engine crew and the third mate (27, 28, 32). He then returned to Erie, Pennsylvania (14), where he called Dr. Reister, the "Marine doctor," and told him about the foot (18). At that time there was a little drainage in the toe (42).

Harold Isenbach, corroborating the plaintiff's testimony, had sailed for nineteen years (155) and was the second mate on the ORION in December, 1955 (158). He also sailed as first mate and master in 1956 and 1957 (155) and was on the vessel for five years in all (156).

He stated that he knew the pumproom on the ORION (158), that he saw and worked with the pumproom tools (156, 167), that they consisted of various long iron bar

wrenches, monkey wrenches, pliers and tools of that nature, both steel and bronze[3] (for non-sparking purposes) (167). In December, 1955, they were "in beaten and battered condition, as usual" (167). None of the tools were new, and were beaten and battered for some time (167).

Isenbach described the pumproom area in which Michalic worked, detailing the position of various gratings, the catwalk and the pumps in the room (159).

The witness explained that Michalic had to obey the orders of his superiors (172-173).

Isenbach saw the plaintiff in October, 1955, and recalled that he walked without any trouble, although he (as well as the first assistant engineer (188, 193) knew that Michalic suffered from Buerger's Disease (174, 175). The ship's officers permitted the plaintiff to work, having knowledge of his condition (193).

On April 1, 1956, the witness saw the plaintiff walking with considerable difficulty, with his shoe top removed (175). He examined Michalic's left foot, which was swollen and festered and gave him a hospital ticket for the Marine Hospital (175).[4]

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[3] All witnesses agreed that a special non-steel, non-sparking bronze tool was used by Michalic, which explained why the tool used was so misshapen, beaten and battered. Bronze, a combination of copper and zinc, is a very soft alloy (hence its use for non-sparking purposes) and subject to the very condition which petitioner complained of, since the steel nuts pressing against the wrench jaw were purposely very tight and required strong blows in order to be loosened.

[4] Isenbach's testimony was then erroneously stricken in its entirety (183) when it was learned that he left the vessel on December 19, some nine days before the accident, on the mistaken theory that he could not know of the condition of the pumproom, tools and the pumproom itself if he was not on the ship on the accident date. As such, the Trial Court rejected evidence which rightly gave rise to the existence of the presumption of continuation of a condition in absence of evidence to the contrary.

The first assistant engineer, testifying for the defendant, stated that he had sent Michalic to assist the pumpman to raise the centrifugal pump casing and check its moving parts as part of the lay-up procedure (180, 181, 191). He further described the area of the pumproom in which the plaintiff was put to work (182-186), and explained that the tools were of a special non-sparking alloy for use only in the pumproom, consisting of different sized wrenches, hammers and scrapers (187) which he fully described (189-190).

The wrench was further described by the defendant's witness, Hansen, the pumpman, as an open end, one and five-eighth inch, made of a spark-proof alloy and weighing two and one-half pounds (207).

Hansen did not show Michalic how to use the tool (207), nor did he watch the plaintiff work (208), although he knew that he was a fireman and had no knowledge of the pumproom, of the tools to be used or of the work demanded of him.

Hansen stated that the three wrenches of the same type (214) were five years old and had been in use for the five years. The witness explained that the tools, which were not made of steel (222) but of a special spark-proof alloy (223), had not been inspected for nine months prior to their use by the plaintiff (224). The nuts, which were very firmly screwed on to form a gasket and avoid leaks, had to be taken off by striking the wrench handle with the mallet (216).

At the close of the defendant's case the Trial Court granted the renewed motion to dismiss the complaint (266).

Petitioner appealed from the order of dismissal, which was affirmed by the Court below on October 29, 1959.

Reasons for Granting the Writ

The decisions of the Courts below are in direct conflict with innumerable decisions of this Court which have assiduously resisted the efforts of Trial and Appellate Judges to usurp injured plaintiffs' constitutional right to a trial by jury. The instant case has not only destroyed that right but has done so with little or no regard for basic propositions of law as laid down by this Court.

This Court has had recent cause, on numerous occasions, to brake the tendency of lower Courts to trespass upon the province of the triers of the facts. *Rogers* v. *Missouri*, 352 U. S. 500; *Ferguson* v. *Moore-McCormack*, 352 U. S. 521.

The instant case, however, represents a unique approach by the Court below in the effort to extinguish the petitioner's right to jury trial under the misguided belief that speed of dispatch is an able substitute for justice.

The District Court dismissed the action at the close of the evidence on the novel theories, *inter alia*, (1) that no jury question was presented as to whether the petitioner was afforded a safe tool with which to work, ignoring the compelling discussion by this Court in *Jacob* v. *New York*,[5] 315 U. S. 752; that a question of fact was always presented as to whether a tool was reasonably safe and suitable for its purpose; (2) that no jury question was presented as to whether the space in which petitioner had to work constituted an unsafe place to work, and (3) in disregarding the fact that petitioner, known to be totally inexperienced in the work, was ordered into the area without instruction in the use of the special tools involved, and that he was not supervised in the work operation.

[5] The *Jacob* case held the simple tool doctrine unavailable in Jones Act actions.

The Trial Judge took upon himself the determination of all the questions of fact which should have been left to the jury and, after coming to his decision on each question, announced that none were left for submission of the case to the jury and dismissed the cause.

That Court confined its discussion and opinion to the question of negligence of the respondent, ignoring entirely the question of seaworthiness of the vessel, evidently on the assumption that if the respondent wasn't negligent, the ship could not be defective.

In the Court below, the decision turned on whether the petitioner had sufficiently described the tool's defect in order to establish the causal relation between the condition of the wrench and the slipping.

Affirmance of the dismissal of the cause, was not on the basis of any legal reasoning but was simply based on the meaning, as stated by the Court, of the language employed by the various witnesses to describe the condition of the tool. By that method, the Court below destroyed the cause simply by setting forth its interpretation of the individual words. In short, the Court was able to determine the facts of the case and by application of a self-determined interpretation of the language so weaken the causal relation of the condition to the accident that the vitality of the testimony was obliterated. By their decision the Court below, as may any Court any time that it doesn't particularly believe or favor the plaintiff's case, simply places its own meaning upon the testimony and dismissed the suit for lack of causal relation. Petitioner submits that this decision, if permitted to stand, may well mark the beginning of the jury trial by Judge by investing the Trial Judge with the autocratic power to modify the customary, accepted and widely held view of the meaning to be given to testimony.

Petitioner submits that the many cases holding that the Court should rule on a dismissal in the light most

favorable to the plaintiff. *Bailey* v. *Central*, 319 U. S. 350; *Schulz* v. *Pennsylvania*, 350 U. S. 523, has been unashamedly violated by the decision of the Court below. The loss of the benefit of doubt in the plaintiff's favor in determining dismissal motions and, in like manner, in their Appellate review would ultimately result in totality of the jury function in the Judge instead of, as it has always been, the mere determination of the existence of a material issue of fact.

Such is the decision of the Court below in the instant case. The effect will be felt, if not reversed, by every plaintiff having somewhat less than that utopian "iron-clad" case. The question is of national import not because the issues are complicated or because the decision of the lower Court will financially effect anyone other than the petitioner, but rather because of the simplicity of the problem and the ease with which the fallacy can spread. The many thousands of litigants in our overcrowded Courts, with their calendar congestions and the search for a scapegoat[6] are the only persons who will be legally emasculated by the overzealousness of the Courts in an effort to speed up the judicial process.

The Court below, after discussing the facts of the case (page 1 to page 6 of the decision) wherein the petitioner and witnesses admittedly described the wrench given to Michalic as "worn", "beat up", "old", "all chewed up on the end", "very beaten and battered", "not very good", "keeps slipping off", then concluded that:

> "To say that a wrench is old, beaten, battered or chewed up gives no information as to whether or not the wrench was adequate or inadequate to perform its function of loosening a nut. Neither do the above adjectives tell whether the grip of the wrench was in any way impaired or it was otherwise an unsafe tool. The plaintiff's evidence did not disclose what

[6] Rather than the simple fact that the number of judicial appointees has not kept apace with the population explosion.

part of the wrench was beaten, battered or defective, except that it was "chewed up" on the end. There was no evidence of any improper design of the wrench or the mallet. The evidence discloses no claim or inference by plaintiff or his witnesses that the wrench slipped or fell because the jaw of the wrench did not properly fit the nuts which were to be loosened by it. There was no evidence that the open or jaw end of the wrench was in any way deficient. We do not think merely stating that the wrench was beaten, battered, old, or chewed up is sufficient to allow an inference that it could not be used safely in the function for which it was designed. Evidence that the wrench was beaten, battered or chewed up, without other definition, was insufficient, in our opinion, to permit a jury to find that these thus described conditions, or any of them, were the cause of its slipping. The fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle of the wrench. There is no evidence from which it could be inferred that some condition described in the evidence contributed proximately as a cause of the slipping."

Petitioner respectfully asks which end of the wrench the Court below thought the petitioner and the witnesses were referring to when they described it? Can there be any doubt but that it was on the jaw end and not the handle in view of the great amount of testimony of constant slippage of the wrench off the bolts.

It is respectfully submitted that it was absurd for the Court below to even harbor the thought that any of the voluminous testimony describing the condition of the tool was directed to any part of the wrench other than the jaw area that came into contact with the bolts.

Can the Court below have possibly felt that the petitioner was not referring to the condition of the jaw that was supposed to grip the bolt when he explained that the wrench kept slipping off the bolts, that he complained to the pump-

man about the condition of the wrench? Is it conceivable that there could not even be an inference that the conditions, so carefully explained, could not have caused the wrench to slip? The entire case, from the original pleadings through trial was pointedly directed to just such a condition and its causal relation.

The Court below apparently (and correctly) reversed the Trial Court's exclusion of the testimony of Isenbach, petitioner's witness and the Second Mate on the ship. In so doing, it seems clear that the petitioner was even then denied the right of rebuttal testimony at which time, perhaps, the Court's belief as to causal relation could have been established. Is not the reversal alone of so important a witness sufficient to have called for a reversal of the dismissal?

The testimony was uncontradicted that the petitioner was unfamiliar with the pumproom or the operation of removing the casing and casing bolts. There was no denial that he was not given any instructions or supervision in order to insure his carrying out of the job, although obviously there was a constant danger of slippage. Even after the petitioner's complaint to the pumpman, there was no instruction or supervision. Was it not a question for the jury as to whether petitioner received adequate instructions and supervision? *Rogers* v. *Missouri*, 352 U. S. 500; *Ferguson* v. *Moore-McCormack*, 352 U. S. 521; *Schulz* v. *Pennsylvania*, 350 U. S. 523; *Tennant* v. *Peoria*, 321 U. S. 29; *Jacob* v. *New York*, 315 U. S. 752; *Lavender* v. *Kurn*, 327 U. S. 645.

The Court below talked only of negligence under the Jones Act, 46 U. S. C. § 688, ignoring completely the cause of action for unseaworthiness irrespective of negligence. Certainly, the question of whether the wrench was in fact unseaworthy should have been submitted to the jury. *Mahnich* v. *Southern*, 321 U. S. 96.

Petitioner respectfully prays that this Honorable Court will once again endeavor to instruct the lower Courts of the inviolate, though sometimes shadowy, line of the jury province in order that the petitioner and those thousands of future litigants, may have the full benefit of the right of jury trial.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: January 25, 1960.

Respectfully submitted,

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APPENDIX

(Opinion of U. S. Court of Appeals for the Sixth Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,580

THOMAS S. MICHALIC,

Plaintiff-Appellant,

—v.—

CLEVELAND TANKERS, INC.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Decided October 29, 1959

Before:

SIMONS and ALLEN, *Circuit Judges*, and O'SULLIVAN, *District Judge*.

PER CURIAM. This action by a seaman, under the Jones Act (Title 46, U. S. C. A., Section 688), concluded by the District Judge's direction to a jury to return a verdict of no cause of action. The propriety of such direction is the matter here for review.

For some years prior to December 28, 1955, plaintiff had been suffering from Buerger's disease. In 1951 he

was hospitalized from an injury consequent upon dropping a sack of cement on his foot, although which foot was not disclosed. In 1952 he was again hospitalized and he then learned that he was suffering from Buerger's disease in his left foot. Some surgery, including the cutting of a nerve in his back, was performed for the purpose of relieving pain which he was then suffering in his left leg.

He claims that on or about December 28, 1955, while using a wrench to remove nuts on a pump housing on defendant's vessel, the wrench, when he struck it with a mallet, slipped and fell, striking the big toe in his left foot. Without interruption, he continued working on the vessel until the conclusion of the lay-up in January, 1956. He rejoined the vessel on March 15, 1956. Plaintiff testified that after a few trips on the boat his leg became so bad he could no longer stand it. He then told his superior officers he wished to get off the boat and asked for a hospital ticket. This was on April 1, 1956. He then, for the first time, told of the claimed incident of the dropping of the wrench. Until then he had told no one of the incident, although he testified that his toe had begun to bother him immediately following the occurrence, requiring him to bathe it rather continuously while on the boat and after the season of navigation while ashore. He did not tell of the accident to the pumpman who had been working with him in the pumproom on the day it occurred. He said he did mention it to a couple of deckhands. Upon receipt of the hospital ticket he went to a Marine Hospital where several amputations were performed, the final one resulting in the amputation of his leg above the knee.

Plaintiff's complaint charged that the vessel and its equipment were unseaworthy and that the defendant was negligent. Aside from some general conclusionary allegations of negligence and unseaworthiness, his specific charges upon which he relied for a cause of action consisted of assertions—

That the defendant did not provide a safe place or way to work; that defendant provided him with a defective wrench, knowing that, "the teeth of the wrench would not hold or be secure"; that defendant ordered and permitted him to work in close quarters; that defendant should have known of a defective condition of the teeth of the wrench; that defendant failed to provide him with a proper and secure wrench which would not loosen when average pressure would be applied; that defendant failed to provide adequate, proper and seaworthy and safe appliances to wit: a proper wrench without worn teeth; that defendant failed to maintain a proper lookout for the plaintiff, and failed to supervise the removal of the nuts off the pump, and to replace a defective, old and unseaworthy wrench; that defendant failed to provide plaintiff with skillful, careful and competent co-employees.

On the trial it was disclosed, without dispute, that the wrench being used by plaintiff did not have any teeth in it, but was an open-end wrench, with a jaw opening of about $1\frac{5}{8}$ inches, approximately 12 inches long and weighing $2\frac{1}{2}$ pounds. It was made of spark-proof alloy metal. Plaintiff was also provided with a metal mallet for the purpose of striking the wrench in the process of loosening the nuts.

On this review, we accept plaintiff's proofs as true and in their most favorable light. Plaintiff and a fellow workman described the condition of the tools with which he was working variously as follows:

"It was a big wrench, old, beat up wrench."

"An old lead mallet they used in the pumproom."

"It was an old wrench, all chewed up on the end."

He testified he told the pumpman:

"This tool is not very good, kind of beat up. This wrench keeps slipping off."

The pumpman said:

"Never mind about that, do the job the best you can."

A former Mate and Captain of the vessel who had been discharged by defendant, described the tools being used in the pumproom in December, 1955, as being, "in beaten and battered condition * * * they had been very beaten and battered."

Although plaintiff's pleadings made no charge of inadequate light or cramped quarters in the pumproom, the following testimony was received on these subjects:

As to illumination, plaintiff said, "to my estimation, it was poor, very poor."

"Q. Did they have any other electricity? A. No, sir, they only had shore lights that's all.

"Q. As far as the illumination in that room, what other illumination was there besides the portable light? A. Nothing, that's all we had, just the portable light.

"Q. And where was it hanging? A. The portable light was hanging over the pumpman's pump on the port side. He had a string tied to it and it was hanging right down beside his pump."

Referring to the portable light in the pumproom, he stated:

"I attempted to move it over to where I was, but it was too short, it wouldn't reach my pump at all."

"Q. Was there any light provided at the catwalk in that area at all, other than what you have described? A. No, sir."

Referring to the portholes between the engine room and pumproom, plaintiff said:

"Those portholes were all dirty and greasy from grease flying around the pumproom."

A fellow workman testified in relation to the light:

"Well, the pumproom wasn't too large. It wasn't a large pumproom and the lighting wasn't too good. In fact, we had to use an extension cord."

The former Mate of the vessel, referring to the lighting in the pumproom, said:

"Very poor. In this lower level at all times it was necessary to use a flashlight in order to see anything in working on this grating level or below."

As to the cramped space in the pumproom, plaintiff testified:

"I was ordered to go into the pumproom. This is the catwalk going from one end of the ship, from the starboard to the port side * * *"

"Q. Now, did you have to get off the catwalk? A. Yes, sir. I had to get off that catwalk, and I had to crawl between four beams that hold the pump from vibrating, work underneath the catwalk.

"Q. As you were working there you stated you had to get between four beams. Can you describe them a little bit? A. Yes, I can. The four beams they help the pump. When the pump is pumping out cargo in a port, the four steel beams that come around the pump keep the pump from vibrating when they are pumping out.

"Q. What is the distance from the top of the pump to the catwalk where you had to go in there and work? A. About six inches.

"Q. Is that the area you had to work? A. Yes."

The above constitutes substantially all of the evidence relevant to the conditions in the pumproom and the con-

dition of the tools with which plaintiff was working. There was no testimony in any way supporting a claim that the slipping or dropping of the wrench was brought about by, or related in any way to, the lighting conditions of the pumproom or to the smallness of the area. Plaintiff had actually removed all but five of an estimated total of twenty nuts before the wrench fell. He makes no claim that the progress of his work was in any way impaired or made more difficult by inadequate lighting or cramped quarters.

"Q. You had no difficulty seeing the bolts, did you? A. No, sir."

Plaintiff's description of the accident is as follows:

"Q. What happened after you took off the bolts and nuts? A. After I started taking the bolts off with the old wrench, only about three or four more to get loose, a couple of them, I had hold of a nut * * * and I hit the wrench and it slipped off and it hit me on the foot at the big toe."

* * *

"Q. Now, when you were taking the bolts and nuts off, how many of those nuts had you taken off at the time the wrench slipped? A. I had them all off but about five or six.

"Q. You took those off without difficulty? A. I had a hard time loosening them off.

"Q. But you got them off? A. Yes.

"Q. In other words, you put the wrench on there and tapped it with the mallet and loosened them and then you turned the nuts off? A. I had a hard time taking them off.

"Q. But you took them off? A. Yes. The pumpman told me, 'Do the best you can.'

"Q. You got them off, and you got all but how many off at the time the accident occurred? A. About five.

"Q. And you were using the same wrench? A. The same wrench.

"Q. And the same mallet? A. Same mallet all the way through."

* * *

"Q. Did you become aware that this wrench as you have described, was getting worn as you were taking these nuts off? A. I told him about it, yes sir.

"Q. Did you go out and try to get another wrench out of the box? A. No, sir, he told me 'You do the best you can with that wrench right there.'

"Q. He told you not to use another wrench? A. He said, 'You do the best you can with that wrench right there.'

"Q. That's the only wrench you could use? A. The only wrench that I had to use."

* * *

"Q. Now, will you describe with as much particularity as you can just how the wrench slipped off the nut? A. Like I say, I had the wrench in my hand.

"Q. You were standing next to the pump? A. I was standing. I got hold over here, and I hit it with the mallet and it slipped off the nut and came down the side of the pump and hit my big toe.

"Q. You hit the handle of the wrench with the mallet? A. Yes, she slipped off the nut on the pump and came down the side of the pump and smashed my big toe.

"Q. That's exactly the way you did it on all the others? A. I had to use the mallet on all the nuts, that's right. They were pretty tight.

"Q. In other words, you had gone through the same maneuver on the others as you had with this? A. Yes, sir.

"Q. Did you have any difficulty putting the wrench on the nuts before hitting it with the mallet? A. Yes, sir, they slipped.

"Q. What slipped? A. The wrench did."

* * *

"Q. I am talking about putting the wrench on the nuts. Did you have any difficulty putting the wrench on the nuts you took off? A. I told you the wrench was slipping off the nuts. It slipped off every one of them."

A fair reading of the District Judge's oral opinion given when granting the motion for a directed verdict, indicates his conclusion that there was no evidence from which the jury could make a finding of negligence or unseaworthiness. We concur in this conclusion and further express our opinion that there was a failure of proof as to any causal connection between the conditions which plaintiff complained of, namely, improper lighting, close quarters and improper tools, and the injury which he suffered.

Neither by accepting plaintiff's proofs in their most favorable light nor by drawing all legitimate inferences therefrom, can it be said that insufficient light or cramped working space had anything to do with the slipping of the wrench which was the immediate cause of the plaintiff's injury.

We come, then, to consideration of whether there was any evidence from which a jury could find that negligence of the defendant or unseaworthiness of the vessel and equipment in any degree contributed to the slipping of the wrench and its falling upon the plaintiff's foot. The allegation of the complaint with reference to teeth of the wrench being worn was abandoned upon showing that it had no teeth, but was an open-end wrench. To say that a wrench is old, beaten, battered or chewed up gives no information as to whether or not the wrench was adequate or inadequate to perform its function of loosening a nut. Neither do the above adjectives tell whether the grip of the wrench was in any way impaired or it was otherwise

an unsafe tool. The plaintiff's evidence did not disclose what part of the wrench was beaten, battered or defective, except that it was "chewed up" on the end. There was no evidence of any improper design of the wrench or the mallet. The evidence discloses no claim or inference by plaintiff or his witnesses that the wrench slipped or fell because of any inadequate grip, nor that the wrench slipped or fell because the jaw of the wrench did not properly fit the nuts which were to be loosened by it. There was no evidence that the open or jaw end of the wrench was in any way deficient. We do not think merely stating that the wrench was beaten, battered, old, or chewed up is sufficient to allow an inference that it could not be used safely in the function for which it was designed. Evidence that the wrench was beaten, battered or chewed up, without other definition, was insufficient, in our opinion, to permit a jury to find that these thus described conditions, or any of them, were the cause of its slipping. The fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle of the wrench. There is no evidence from which it could be inferred that some condition described in the evidence contributed proximately as a cause of the slipping.

The recent cases of *Rogers* v. *Missouri Pacific Railway Co.*, 352 U. S. 500, and *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, relied upon by appellant, emphasize the jealousy with which today's courts guard the rights of injured workmen to have their causes submitted to a jury where there is any evidence, however slight, to justify a jury's factual finding of liability. The rule that the plaintiff in such a case as this has the obligation to produce some evidence to prove, or permit a justifiable inference of, negligence and proximate cause is, however, still a part of our law. It is the function and duty of trial courts to determine whether or not in a particular case there is any evidence to justify the submission of a case to a jury.

In the case of *Ferguson* v. *Moore-McCormack*, supra, the Supreme Court affirmed the rule that the standard of liability under the Jones Act is the same as applied in actions under the Federal Employees Liability Act. In a case arising under the latter Act, the United States Supreme Court in the case of *Moore* v. *C. & O. Railway Co.*, 340 U. S. 573, 575, said:

"To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident."

We approve the ruling of the District Judge that the plaintiff in this case failed to provide any evidence from which a jury could find liability. It should be noted here that on his second cause of action for maintenance and cure, plaintiff recovered $2,610.00. No appeal was taken from that judgment.

The judgment of the District Court is affirmed.

Opinion of District Court

The Court: Let me start where Mr. Sampliner left off. It is true when you were asking questions of the prosthesis man from Detroit we sustained objections because you asked a variety of questions which were improper. Had you asked the question of the cost it would have been admitted, should have been admitted. You never made any effort to ask that, but I assume whatever the bill is you have got it and there is no question on its mere presentation it will be accepted."

This has been a case which has caused us some worry in some respects, particularly as we look forward to what appear to be the prospective proximate causes with which the jury might have been concerned, if the jury was going to be concerned. We have the original possible proximate cause that the man's condition could have been caused had he had the condition back in '48. The jury might well have found that the leg would have come off anyway because of the condition, or there could have been an aggravation of the condition caused by the man's own conduct, in that he never abated the smoking habit until very, very recently, and then not completely. In other words, for whatever reason, he would not give up smoking, knowing it was the most dangerous thing in the world for him. That was [253] the second possible proximate cause.

Then you have the possible cause of trauma here, if trauma would have been found by the jury to have hastened what happened. But at no time was any medical man asked any opinion as to the degree to which it would have been hastened, and the jury, if they would have gotten the case, would have no information to go on other than the fact it was hastened.

Of course, there was always the fourth possibility that the jury might say a man with such a history, such a terrible

illness, and it is a terrible illness, why the Lord permits it is His business, no one seems to know what starts it, there was a possibility a jury would figure a man who would have such an illness would have run and reported it the minute he hurt himself, knowing the prospect he had of a very serious injury as the result of a very serious injury to himself for which his employer was in no way responsible. The fact he didn't report it for some months might be considered as some evidence [254] by the jury he was never hurt in the way in which he says.

This business of Buerger's Disease has reached the point where there is quite a bit of elucidation about it. The man had numbness in his leg in 1949, he had a sympathectomy in 1951; hit the same toe with a fire brick in '51 or '52; never stopped smoking. Then we had the experts who really told us about this amputation business, as far as they are concerned. Dr. Bright said out of a 150 to 170 cases 15 percent of those who wouldn't quit smoking lost their foot. Dr. Silbert in New York was reported to have said, and he is apparently the highest authority in their specialty, that out of 436 cases that stopped smoking he avoided amputation.

Now, then, the petition set up the claim with reference to what was wrong with the wrench—"using an old defective wrench in an unseaworthy condition in that the teeth and grip of the wrench were worn and defective". Never, from one end of the lawsuit to the other, has the word "teeth" been used [255] of that wrench. There has never been one mention of the fact the teeth were worn. Never has there been a mention of the fact the grip was worn, not one iota of testimony. And after I called this to the attention of all counsel on motion at the end of the plaintiff's case, the plaintiff's counsel sought to rehabilitate himself on the wrench with the cross-examination of defense witnesses, and successfully proved the wrench had no teeth.

As a matter of fact on that type of wrench there are no teeth, so there is no iota of evidence the teeth had been worn and no iota of evidence that the grip was worn, and the grip has not been mentioned from the time of the lawsuit to this minute.

So the plaintiff has proved no part of his contention with reference to defect; and the defect in the wrench is the foundation of the plaintiff's claim here.

I know the plaintiff mentioned the fact the wrench wasn't any good. The pumpman says they never discussed any such thing. Now, as Mr. Sampliner says, what the pumpman said could be considered by the jury, as [256] between what two witnesses say, one of whom was working for the defendant, should it get that far. The pumpman says "this is a tool I bought five years ago and there are three of these on this ship"; they are used for only one purpose once a year; "we use them to take the nuts off the pump head casing; and having been used just five times in five years there is absolutely nothing wrong with the wrenches." Should a jury be called upon to decide as to which of the two contending witnesses was right, when the plaintiff had only testified there was some defect in the wrench, and he starts out on the theory the teeth are worn, and there are no teeth, and he starts out on the theory the grip is worn, and there is never any mention of the grip in the case until I mentioned it right now?

For authority they tell me what the Supreme Court has required. That's why we checked the case Mr. Sampliner mentioned, and I called counsel's attention to it after plaintiff's case was completed, because of the detailed description there given of that wrench which was considered to be improper, [257] and in that case there is given quite a bit of description about the wrench, what it would do and what it would not do, and why it slipped. We do not have that here. All we have here is the conclusion of the plaintiff.

the conclusion it is defective, it is worn, it is an old wrench, chewed-up wrench. Nowhere in this case is there anything on which this jury could ever be called upon to decide to what degree the teeth had been worn and to what degree the grip had been worn because neither the teeth nor grip have been mentioned since the time the lawsuit began.

Now, in the Jacob case, as I said before, it was a case where the Court said it was a close question, a closely decided case, because as I said before three of the Judges of the top court were on one side of the fence and three on the other and they were evenly divided. They go on to say what the jury might have been called upon to have decided. That is to say, it was for the jury to decide whether a monkey wrench was a reasonable safe and suitable tool. It was said that if he hadn't liked the wrench he used, he could have used another wrench, so the Court said the [258] jury should have decided whether a monkey wrench or a prospectively substituted wrench should have been used, and whether it was reasonably safe for the work in hand. Next there was a question whether the respondent's failure, when it had two or possibly three weeks to supply the petitioner with a new wrench, amounted to negligence. That man had complained about the wrench in the three weeks three times, and he had to use it every time the boat made a trip across the river, and it was crossing the river all the time, and each day he had to take nuts off some part and put them back.

We have no such situation here. So, actually, what they said there was that the case should have gone to the jury on the ground whether the ship company was negligent for having failed for a period of three weeks to get the man another wrench.

Here we have no proof of defect. We have a conclusion about an alleged defect. And the question that we must also then consider is if the jury has nothing to go on but

[259] the conclusions of this plaintiff, then must we submit the case to them? A man takes the stand and says, "I had a tool which was defective." Period. That's what this man said. He has come to the conclusion which only the jury is allowed to reach. Now, must they be given the case to decide whether or not they will accept his conclusion, when they are not given evidence of the facts on which his conclusion is based?

I think the obvious answer to that is it simply cannot be done.

Now, let's get down to his work. At one point in the case it was stated there were 35 or 40 nuts to be handled, another point 25, and another point 20; and another point it was said he had taken off all but four or five or six or seven nuts. In any event the tool seemed to do very well up to a point where something happened. He demonstrated how he hit this so-called grip of the wrench—he never used the word grip, I used it—with the hammer, holding it in the left hand and striking down with the right. I don't know whether he was tightening the nut or not, but it looked like he was. It has been suggested maybe he hit it too hard. I do not [260] know. All I know is what the evidence has shown, that it had a smooth jaw. That was brought out on cross-examination by plaintiff's counsel, when plaintiff's counsel did seek to rehabilitate his case because at the end of plaintiff's case I had suggested that there was no proof, in accordance with the petition, with reference to the claim set up. So plaintiff's counsel, and very properly so, that is his privilege and his right and duty, was trying to show if he could on defendant's proof he had a case, and the only evidence he elicited was that it was a smooth wrench.

Now, it is claimed by the complaint that this was a worn tool. The proof was that it had been used five times. The claim is it was defective, and beyond using the word, there is no proof wherein it was defective, no proof the teeth

were worn, for it had no teeth, and no proof its grip was worn because grip was never mentioned until I decided to talk about it here. None of the allegations set forth in the petition are proven, and no effort to correct or amend the petition, and no suggestion a mistake had been made and there was [261] something else wrong with it.

Incidentally, while I put it on the record, it is really off the record, I asked counsel three or four times in pretrial wherein this thing was defective, and all the answer I was ever able to get was that it would come out in the lawsuit, and the answer that it would come out in the lawsuit is no answer at all.

So this gentleman either got 15 nuts out of 20 or he got 34 out of 40, either way; he wasn't doing too bad a job with the wrench, and it is probably no wonder because the wrench had been used on five other occasions and probably was in splendid shape.

It, finally, does not have the defects claimed and no other defects are suggested. What could the jury be called upon to determine with reference to the wrench? Wherein can reasonable minds differ on what we have here? What defect has plaintiff talked about concerning which the jury could be called upon to judge whether there is a defect there or not? Is it that the teeth are worn, when there are no teeth? Or that the grip is worn, when the grip has never been mentioned? Or am I required, [262] to hand to the jury just a conclusion of a plaintiff, who of course has an interest in the case, which is understandable, but who merely says, "It is worn. It is defective. It is chewed up. And for that I want $350,000."

A man has been carrying a defect, and it is too bad he does, for some eight or nine years, or longer for all we know. He is very conscious of it. He had been operated on to stop the pain, cutting the nerves to stop the pain. The condition goes on. But the point is, I suppose to a degree he could

have had this same thing happening in another way. He could have got it on another ship he was on, or perhaps got it on no ship, but he is the only one to decide that, the only one who should decide it.

I would assume the highly-specialized counsel in the Court Room learned quite a bit about Buerger's Disease in this lawsuit as I did, and everybody else listening to the doctors. There is not much disagreement about this.

He washed the foot, he did nothing to stop smoking except very recently, to prevent [263] aggravation of that condition which has been going on since 1948. He could have got it if he never hit his foot, of course we don't know if he hit his foot, nobody knows but him. There is always the possibility if he did hit his foot he would have reported it instantly, because no one knew better than him the implication, the future he had immediately on hurting himself, if he hurt himself. The fact that he didn't report it, kind of militates against his claim that he did hurt himself.

Much is said about the lights here. Since plaintiff said he had no difficulty in seeing the nuts when he took them off, I don't think the lights are involved in the case at all.

Counsel in his last discussion talked about how cramped the space was. Well, we have seen the photographs. It is not cramped to the point where he couldn't get at the casing; the other man got to his.

Counsel for plaintiff suggests, oh, he wasn't used to this, he was a fireman. Sure he is, but the testimony seemed to be part [264] of the job when they lay-up and fit-out was to do the very work around this pump they were doing. Of course, he couldn't have had much experience doing it, nor would he need much. He was around the ship a few years and once a year they did the work, which is the reason why the wrench probably wasn't worn at all, probably was just as smooth as his immediate superior related. He said there were no worn places, it was in good condition, and that the plaintiff never complained to him about it. He

testified that he had three wrenches all of the same size, all three good, they weren't chipped. He checked them when they came out of the tool chest, and he was cross-examined when he checked them, but he said nine months before meaning they hadn't had to look at them since they put them away, there was no reason to look at them, meaning it was about as unused a tool as there was on the ship because once a year they got it out for these 30 or 40 nuts. Pretty much as you would remove a tire when you get a flat and have to take off a half a dozen nuts. You [265] don't wear out your nuts or bolts; you don't wear out wrenches using them once a year for five years.

I will say again, gentlemen, I don't see anything here on which reasonable men could differ. So I find not one iota of evidence on the claims set forth in the complaint, which has never been modified, changed or amended at any time or any claim suggested that it be so amended.

I see no reason for discussing the simple tool doctrine. I do not think in the Jacob case the Supreme Court intended to abrogate it and so it has no application. I am not called upon so to say. My question is, is there any evidence concerning which reasonable minds on a jury might differ? No negligence has been offered for the consideration of this jury in the form of such defects in this tool as have been complained of throughout this case, and reasonable minds could not honestly differ as to whether the teeth in the wrench were worn when there are no teeth in the wrench. And reasonable minds could not honestly differ as to whether the grip is worn, when the grip [266] isn't mentioned from the time the case began until I mentioned it in this little discussion.

Since there is no proof in this case I grant the motion here.

Mr. Sampliner: We note an exception here and we will appeal.

Order of Dismissal of the District Court

In conformity with Rule 77(d) of the Federal Rules of Civil Procedure please take notice that the following order or judgment was entered on Feb. 27, 1958. C. B. Watkins, Clerk, U. S. District Court, Northern District of Ohio:

Upon a verdict of the jury, by direction of the court, finding for the defendant on the first cause of action, and for the plaintiff on the second cause of action, for maintenance and cure, in the sum of $2,610.00,

IT IS ORDERED that the first cause of action is hereby dismissed.

FURTHER, IT IS ORDERED that plaintiff recover from the defendant, on the second cause of action, the sum of $2,610.00 and costs, for maintenance and cure.

/s/ C. B. WATKINS,
Clerk.

Judgment of the United States Court of Appeals for the Sixth Circuit

Appeal for the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause by and the same is hereby affirmed.